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THE RESPONSIBILITY OF THE CRIMINAL DEFENSE LAWYER IN 1996

*Brian O'Neill**

While participants in this Symposium will address other aspects of the criminal lawyer's responsibility, I would like to focus on the responsibilities of lawyers in the existing political climate. The lawyers' responsibilities to the law require them to stand up to those in public life who, for political advantage, would diminish the law's protections.

The political rhetoric of 1996 is laced with references to the very real problem of crime in America. "Taking back our streets," "breaking the cycle of drugs and crime," and "making our cities safe again" have been identified as political goals in this presidential year. These political goals reflect the public's understandable fear of violent crime. In such an atmosphere even the most extreme public safety measures will be seen as fair and reasonable. Thus, politicians continue to press for increasingly stiffer penalties for crimes. They show little enthusiasm for addressing the related problems of the breakdown of the family, the failure of the public education system, and the lack of effective gun control.

Office seekers from both parties regularly attack judges who uphold the constitutional rights of the accused against prosecutorial and police excesses. Prosecutors, aided by courts, assault the Sixth Amendment right to counsel with as much zeal as they do the Fourth Amendment right to privacy.

It is often said that "these are critical times," and sometimes they really are. The public furor over crime and the political response to it make this a truly critical time for our country and for the criminal defense bar. The two specific problems confronting the criminal justice system in the mid-1990s are: (1) the govern-

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ment's trampling of the most significant civil right, the right of privacy; and (2) the government's continuing attack against those who assert that right, the criminal defense bar.

Orwell's *1984*¹ and Kafka's *The Trial*² dramatized the harm caused to individuals by an oppressive state seeking to impose its will. The rights of individual citizens were taken from them, and the state became all powerful at the expense of individual liberties. Indeed, in the societies these novels portray, the individual ceased to have any private life at all.

The governments in these two novels were evil governments with evil designs. Recent years have seen a benign, well-intentioned government bent on stamping out crime and winning a "war on drugs" by engaging in the same conduct as the evil governments of *1984* and *The Trial*, with the same consequences to individual rights.

Admittedly, the courts are under great pressure to enforce penal sanctions against those accused of a crime. And fortunately, our system is one where most of the persons charged with crimes have indeed committed the crime charged. When presented with difficult issues in criminal cases, courts are asked to decide between enforcing an abstract constitutional right such as the right to privacy, knowing that the defendant at bar may escape liability thereby, or declining to enforce the right so that someone who probably is guilty can be convicted and punished.

At other difficult times in American history, however, our courts have courageously upheld basic constitutional rights against invasion by the government notwithstanding the unpopularity of the decisions. For example, the United States Supreme Court has struck down loyalty oaths as preconditions for employment³ even as Senator Joseph McCarthy terrorized public officials with disclosure of their lack of loyalty in the so-called "war on communism." And, during the worst part of World War II—a real, honest-to-God war—the Supreme Court upheld the right to refuse to salute the flag.⁴

Why, then, have courts recently been willing to sustain any governmental imposition on citizen rights that interfere with the

1. GEORGE ORWELL, *1984* (The New American Library 1961)(1949).

2. FRANZ KAFKA, *THE TRIAL* (Willa Muir & Edwin Muir trans., Schocken Books 1974)(1937).

3. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

4. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

successful prosecution of the war on drugs? The answer is that the justice system depends upon the public's acceptance. The public expects the efficient resolution of cases, the consistent achievement of just results, and the conviction of the guilty. In recent years in response to increasingly visible violent crime, the public has demanded the conviction of the guilty without much concern about how that goal is achieved. The fear of crime obscures the fact that a shrinking Constitution will affect us as adversely as crime itself.

At the same time, the belief that much of the crime problem could be solved if drug trafficking were suppressed has spurred Congress to spearhead the war on drugs, with the state legislatures following in Congress's wake. Just as real wars destroy the social fabric, so too has the war on drugs damaged the Constitution. Privacy, one of the fundamental civil rights of the Constitution, is ironically most at risk in the criminal setting. It is almost exclusively in the criminal context that the government asserts its right to invade privacy, and therefore, it is the criminal lawyer who must protect this most sacred right.

It is the responsibility of the criminal defense lawyer to protect against the further erosion of constitutional rights even when, due to changing attitudes, the criminal lawyer becomes the target for investigation and prosecution. Thus, the criminal lawyer must hold the government to the Constitution when it misbehaves and must do so relentlessly—not yielding when the pressure is raised. To do so today is a much riskier proposition than it once was. A casualty of the war on drugs has been the relationship between the lawyers who prosecute crimes and the lawyers who defend the accused. The enforcers, prosecutors and police both, more than at any time in the last half-century, view criminal defense lawyers as collaborators with the enemy in the war on drugs, a fifth column inconveniently guaranteed by the Constitution to the accused.

It appears to be the case across the country that prosecutors carrying out the mandates of the war against crime are imbued with the nobility of their cause to such an extent that they no longer regard their brothers and sisters across the courtroom as professional colleagues. Rather, they view them as the morally infirm aiders of the criminally culpable. One prominent Los Angeles prosecutor, for example, refuses to address any criminal defense lawyer by name because of his view that they, like the criminals he prosecutes, are unworthy of being personally ad-

dressed.

Courts have all too often adopted the same view of lawyers for the accused, and have responded positively to prosecutors' demands that defense lawyers be shoved out of the way or intimidated into silence. A litany of developments in the law concerning criminal lawyers over the last twenty years includes some of the most constitutionally shameful misconduct imaginable in a system of law:

- (1) Unsupervised search of lawyers' offices;
- (2) Indictment of criminal lawyers for providing legal advice to unsavory defendants;
- (3) Seeking contempt charges for statements to the press made by defense lawyers, although the prosecution is immune from such charges;
- (4) Calling the client's lawyer before the grand jury to offer testimony against the client;
- (5) Using lawyers' fees to prove tax cases against their clients; and
- (6) Attacking joint attorney-client privilege agreements.

One always hopes that the courts will intervene and calm tempers. However, the appointments to the state courts, in California at least, are remarkable for a homogeneity that does not augur well for those accused of crime or their lawyers. The new judges are drawn almost exclusively from a district attorney's office or the United States Attorney's Office.⁵ Typically, these lawyers entered the district attorney's office immediately from law school, and remained there until their appointment to the court.⁶ The assistant United States attorneys have only slightly broader backgrounds, having generally gone to the United States Attorney's Office after a few years at a large corporate law firm.⁷ Thus, our bench increasingly is peopled with lawyers who have exclusively represented large institutions such as corporations or the government. A judge with such a narrow base of experience may easily fall into the trap of accepting the arguments made about the morally inferior status of the criminal defense lawyer.

5. See JUDICIAL YELLOW BOOK 618-41 (Leadership Directories, Inc. Spring 1996).

6. *Id.*

7. *Id.*

This is the world we face in 1996. It is not a good situation for the body politic. The criminal defense lawyer bears the major responsibility of responding to the overreaching prosecutor and the all-too-compliant judiciary. The defense lawyer has the responsibility to hammer home to the courts, the prosecutors, and to the public, the basic, but often forgotten, point that the integrity of the Constitution is more important than an immediate victory in the war on drugs. While this responsibility is not the lawyer's exclusive mission, there are few other groups with the training to fight this fight, or the forum in which to fight it.

The stakes are very high—as observed by the English playwright Robert Bolt in his brilliant play about the moral dilemma faced by Sir Thomas More.⁸ More was confronted by Roper, a zealous young attorney who urged the prosecution of Richard Rich, a political rival of More's. More declined, stating that the devil himself would be immune from prosecution until he broke the law. There followed this exchange between More and Roper:

ROPER: So now you'd give the Devil benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.⁹

Government has a tendency towards the exercise of power—a good government wants to stamp out crime and will tend to exercise power to achieve that goal. For example, our government kidnapped a Mexican citizen whom it suspected of aiding in the murder of a drug enforcement agent,¹⁰ and our government plotted

8. ROBERT BOLT, *A MAN FOR ALL SEASONS* (1960).

9. *Id.* at 66.

10. Steven A. Holmes, *U.S. Gives Mexico Abduction Pledge*, N.Y. TIMES, June 22, 1993, at A11.

the kidnapping of an American commodities broker living in Switzerland whose extradition was denied by the Swiss Court.¹¹ Both were cases wherein the government was tempted to use power to achieve a good end. In both cases the government overstepped its constitutional authority, clearly demonstrating that a government is most dangerous when it is pursuing a worthy end. It is not worthy of our government to deprive the criminally accused of their rights—it is just easy to do so.

Our Constitution was meant for everyone—not just the socially acceptable. If the rights of the criminally accused are not protected, the winds that blow across the land to topple the Fourth Amendment will next topple the Fifth Amendment, the Sixth Amendment, the attorney-client privilege, and any other shield against government intrusions. And when these too are gone, who will be safe against the power of government?

11. Greg Hitt, *Bond, Treasury Bond: Top Enforcer Mulled Plot to Kidnap Fugitive Trader*, WALL ST. J., June 13, 1996, at A6.